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IN THE
COURT OF APPEALS OF INDIANA

PARTOW DEVELOPMENT, INC.,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 32A01-0706-CV-287
	)	
ARMANDO GONZALEZ,	)	
	)	
Appellee- Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0609-PL-62

November 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Partow Development, Inc. ("Partow") appeals the trial court's findings that Armando Gonzalez ("Gonzalez) was permitted to build a pool house and attorney fees because the neighborhood restrictive covenants were ambiguous and laches estopped Partow from objecting to Gonzalez's design. On appeal, Partow raises several issues, which we restate as:

I. Whether the restrictive covenants were ambiguous;

II. Whether laches estopped Partow;

III. Whether the trial court abused its discretion in ruling on the admissibility of conclusory testimony; and

IV. Whether Gonzalez is entitled to attorney fees.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

On June 2, 2004, Gonzalez purchased two lots from Partow in the Eagle Village Addition located in Hendricks County. The Eagle Village Addition had restrictive covenants that stated in part:

> **LAND USE AND BUILDING TYPE** – The lots shall be used for residential purposes only. No building shall be erected, altered, placed or permitted to remain on any Lot other than one detached, single family dwelling, an attached private garage not to exceed four cars, and normal and customary, accessory structures exclusive of barn, stable external storage, detached room, etc.

Appellant's App. at 62. The restrictive covenants also required that all plans be submitted to the Environment Committee for approval and provided that if forty-five (45) days pass after plans are submitted, approval is no longer required. *Id.* at 62-63.

On September 20, 2004, Gonzalez submitted his plot plan and house plan prior to construction. Within Gonzalez's plot plan but not in his house plan was a 225 square foot detached pool house. Jim Partow ("Jim Partow"), the sole member of the Environment Committee, remembered the pool house was listed on the plot plan, but claimed he did not know what it was. However, Jim Partow never asked Gonzalez about the pool house.

On May 23, 2006, Gonzalez obtained a building permit for the construction of a pool house. The pool house in the building permit differed from the pool house described on the original plot plan. After the pool house was seventy percent complete, Partow sent Gonzalez a letter objecting to the pool house construction. In response, Gonzalez sent Partow the plans and specifications for the pool house. The Environment Committee disapproved the plans and demanded Gonzalez stop construction and remove the partial structure. Thereafter, Gonzalez submitted different plans and specifications that would connect the residence to the pool house and fully enclose the pool area. The Environment Committee again disapproved the plans. Over Partow's objection, Gonzalez completed the pool house[1] construction.

Partow brought suit against Gonzalez. During trial, Gonzalez cross-examined Jim Partow and asked whether he was aware that ambiguities in restrictive covenants are read in favor of the homeowner. *Tr.* at 54-55. Partow objected claiming that the question called for a legal conclusion, and the trial court overruled the objection. After the trial,

[1] The parties disagree as to the size of the pool house. Partow claims the pool house is 1,500 square feet, the amount of space partially enclosed and fully under roof. Gonzalez states the pool house size as 170 square feet, which is the amount of space fully enclosed under roof.

the trial court entered findings of fact and conclusions thereon, which stated in part: 1) the restrictive covenant relating to land use and building type was ambiguous; 2) Partow was barred by the doctrine of laches from disapproving Gonzalez's design because the Environment Committee did not reply to Gonzalez's design within forty-five (45) days; and 3) Gonzalez is entitled to attorney fees. Partow now appeals.

DISCUSSION AND DECISION

When a trial court enters findings of fact and conclusions thereon, pursuant to Indiana Trial Rule 52(A), we may "not set aside the findings of fact unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences therefrom that support them. *Press-A-Dent, Inc. v. Weigel*, 849 N.E.2d 661, 668 (Ind. Ct. App. 2006), *trans. denied* (citing *Learman v. Auto-Owners Ins. Co.*, 769 N.E.2d 1171, 1174 (Ind. Ct. App. 2002), *trans. denied*). To the extent the conclusions are based on erroneous findings, those findings will not vitiate the judgment if the court correctly applied the law and the conclusions are otherwise supported by valid findings. *Id.* (citing *Lasater v. Lasater*, 809 N.E.2d 380, 397 (Ind. Ct. App. 2004)).

I. Restrictive Covenants

A restrictive covenant is an agreement between a developer and a homeowner to agree to refrain from using property in a particular manner. *Johnson v. Dawson*, 856 N.E.2d 769, 772-73 (Ind. Ct. App. 2006) (citing *Mayer v. BMR Props., LLC*, 830 N.E.2d 971, 979 (Ind. Ct. App. 2005)). Because covenants are a form of express contract, we

apply the same rules of construction. *Id.* (citing *Renfro v. McGuyer*, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003), *trans. denied*). Construction of the terms of a written contract is a pure question of law for the court, and we conduct a *de novo* review of the trial court's conclusions. *Id.*

"Indiana law permits restrictive covenants but finds them disfavored and justified only to the extent they are unambiguous and enforcement is not adverse to public policy." *Id.* (citing *Holliday v. Crooked Creek Vills Homeowners Assoc., Inc.*, 759 N.E.2d 1088, 1092 (Ind. Ct. App. 2001)). Restrictive covenants are strictly construed to ensure an individual's free use and enjoyment of his or her property. *Id.* (citing *Renfro*, 799 N.E.2d at 547). If the language is clear and unambiguous, we give it its "plain, usual, and ordinary meaning." *Id.* If reasonable people could disagree as to the meaning of a particular covenant, it is ambiguous and must be read in favor of the homeowner. *Stout v. Kokomo Manor Apartments*, 677 N.E.2d 1060, 1064 (Ind. Ct. App. 1997). "'[T]he paramount rule for interpretation is to give effect to the actual intent of the parties . . . as collected from the whole instrument . . . .'" *Johnson*, 856 N.E.2d at 773 (quoting *Renfro*, 799 N.E.2d at 547). We read all the covenants together as a whole and give meaning to those portions that can be reasonably interpreted. *Id.* at 773-74.

In *Johnson*, this court interpreted a restrictive covenant that stated: "No structure shall be erected, altered, placed or permitted to remain on any residential building lot other than one detached single family dwelling not to exceed two stories in height and a private garage for not more than three cars . . . ." *Id.* at 773. There, residents challenged whether a homeowner was permitted to build a detached two-car garage in addition to the

existing attached two-car garage. The residents claimed that the restrictive covenant precluded the landowner from building more than a total of three garage spaces on the property. We agreed with the residents and the trial court that the restrictive covenant was ambiguous as to how many garage-type structures may be built and in what manner, but that it was clear as to how many garage spaces were permitted on each lot – three. *Id.* at 776.

Partow claims that the restrictive covenant's language: "No building shall be erected, altered, placed or permitted to remain on any Lot other than one detached, single family dwelling . . . and customary, accessory structures exclusive of barn, stable external storage, detached room, etc." was not ambiguous as to what other types of buildings are prohibited, including a pool house. *Appellant's App*. at 62. We disagree. The language does not expressly exclude a pool house, and reasonable people could disagree as to whether "normal and customary, accessory structures" and "barn, stable external storage, detached room, etc." were meant to include or exclude a pool house. Thus, the trial court properly concluded that the restrictive covenant regarding building type and land use was ambiguous.

II. Laches

The doctrine of laches is well-settled and long recognized: "'Independently of any statute of limitation, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them.'" *SMDfund, Inc. v. Fort Wayne-Allen County Airport Auth.*, 831 N.E.2d 725, 729 (Ind. 2005) (citing *Penn Mut. Life Ins. Co. v. Austin*, 168 U.S. 685 (1898)). "Laches requires: '(1) inexcusable

delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party." *Id.* (citing *Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996).

Partow argues that it was not barred by the doctrine of laches because the covenant requiring a homeowner to submit any building and plot plans to the Environment Committee prior to construction was not ambiguous and, therefore, did not permit Gonzalez to begin construction. The Covenant provided that "No structure will be erected . . . until the plans and specifications therefore (including elevations, materials, colors, texture landscaping and site plans . . .) will have been filed with the Environment Committee, and approved in writing by such committee." *Appellant's App* at 62. Although Gonzalez's plot plan showed a pool house and he provided it to the Environment Committee several months before construction, and although Paragraph five of the covenants stated that if the Environment Committee did not act within forty-five days of submission of such plans, no approval was necessary, Gonzalez did not submit the plot plan or building plan for the pool house he constructed as required by the Covenants. The fact that the covenant regarding "customary, accessory structures" is ambiguous does not bar Partow from enforcing the covenant calling for the submission and approval of all plans for structures to be constructed. Here, Partow did not inexcusably delay in asserting its objection to the pool house because Gonzalez never complied with the covenant's unambiguous requirement to submit all drawings and

specifications to the Environment Committee prior to construction. The trial court erred in concluding that the doctrine of laches applied to Partow.

III. Evidentiary Ruling

Partow claims that the trial court abused its discretion in overruling its objection to Gonzalez's cross-examination question that it asserts called for a legal conclusion. Evidentiary rulings are within the discretion of the trial court, and we will only reverse for an abuse of that discretion. *Mann v. Russell's Trailer Repair, Inc.*, 787 N.E.2d 922, 926 (Ind. Ct. App. 2003). An abuse of discretion occurs when the trial court's decision is against the logic and effects of the facts before it. *Id.* Pursuant to Indiana Evidence Rule 704(b) a witness is not permitted to testify to ". . . the truth or falsity of allegations; whether a witness testified truthfully; or legal conclusions."

Here, Gonzalez asked whether the witness, Jim Partow, was aware that ambiguous restrictive covenants are read in favor of the homeowner. *Tr.* at 54, 55. The question asked whether Jim Partow was aware of the law; it did not ask what the law was. Therefore, the trial court did not abuse its discretion.

IV. Attorney Fees

Partow asserts that it was error to award Gonzalez attorney fees. We review an appeal of attorney fees for an abuse of discretion. *H & G Ortho, Inc. v. Neodontics Int'l., Inc.*, 823 N.E.2d 734, 737 (Ind. Ct. App. 2005). Generally, litigants must pay their own attorney fees. *Davidson v. Boone County*, 745 N.E.2d 895, 899 (Ind. Ct. App. 2001). An award of attorney fees is not allowable in the absence of a statute, agreement, or stipulation authorizing such an award. *Id.*

Here, the parties stipulated in the covenants that the prevailing party would pay costs and attorney fees for the other side. *Appellant's App.* at 64-65. Since neither party fully prevails, each should bear their own fees.

Affirmed in part reversed in part.

ROBB, J., AND BARNES, J., CONCUR.